STATE OF MICHIGAN

COURT OF APPEALS

TERRY ROBERTSON, Plaintiff-Appellee,	UNPUBLISHED April 22, 2014
v	No. 310552 Oakland Circuit Court
CITY OF PONTIAC, Defendant-Appellant.	LC No. 2011-118770-NO

Before: HOEKSTRA, P.J., and SAWYER and GLEICHER, JJ.

PER CURIAM.

In this trip and fall case, defendant appeals as of right the trial court's order denying its motion for summary disposition under MCR 2.116(C)(7), (8), and (10). Because we conclude that plaintiff complied with the statutory notice requirement and because there are genuine issues of material fact regarding whether defendant is liable for plaintiff's injuries, we affirm.

On appeal, defendant first argues that plaintiff's notice did not satisfy the requirements of MCL 691.1404(1). Plaintiff's claim is based on injuries he sustained after falling on the sidewalk while jogging. On January 12, 2011, plaintiff provided defendant written notice of his claim that stated on or about November 21, 2010, in the City of Pontiac, plaintiff tripped and fell on a defect in the sidewalk "directly in front of 236 Cherokee Road, Pontiac, Michigan," and suffered injuries as a result. Photographs of the defect were attached to plaintiff's notice. On March 18, 2011, plaintiff provided defendant with a supplement to the original notice by providing a form that he completed for the Michigan Municipal Risk Management Authority. The supplement also stated that the defect was located in front of 236 Cherokee Road, and included photographs depicting the defect, which was described as a four to five inch vertical gap between two slabs of concrete in the sidewalk.

Plaintiff was deposed on January 4, 2012. During his deposition, plaintiff estimated that the defect was about 100 yards north of Voorheis Street. However, subsequent measurements demonstrated that 236 Cherokee Road, which is the actual location of the defect, is in fact about 216 yards north of Voorheis Street. Defendant moved for summary disposition in the trial court on the basis of this discrepancy. Specifically, defendant argued that plaintiff's notice was rendered invalid and defective because it indentified a location that was different from the location identified by his deposition testimony. The trial court rejected defendant's argument and found that the notice was sufficient. Defendant now appeals the trial court's denial of his

motion for summary disposition and reiterates his argument that the notice was defective in light of plaintiff's deposition testimony about the location of the defect.

We review de novo a trial court's decision to grant summary disposition. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). The trial court did not articulate the grounds for its decision; however, MCR 2.116(C)(7) is the proper court rule for dismissal under MCL 691.1402 and MCL 691.1403 because both sections are part of the governmental immunity statute. Pursuant to MCR 2.116(C)(7), summary disposition is appropriate if a claim is barred because of immunity granted by law. A motion pursuant to MCR 2.116(C)(7) may be supported by affidavits, depositions, admissions, or other documentary evidence so long as the evidence would be admissible. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). *Id.* "[T]he trial court must accept the nonmoving party's well-pleaded allegations as true and construe the allegations in the nonmovant's favor to determine whether any factual development could provide a basis for recovery." *Hoffman v Boonsiri*, 290 Mich App 34, 39; 801 NW2d 385 (2010).

Under the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, a governmental agency is immune from tort liability "if the governmental agency is engaged in the exercise of discharge of a governmental function," unless one of the GTLA's specific exceptions apply. MCL 691.1407(1). At issue in this case is the highway exception, under MCL 691.1402, which provides in pertinent part:

> 1) Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.

MCL 691.1401(c) defines "highway" as "a public highway, road, or street that is open for public travel. Highway includes a bridge, sidewalk, trailway, crosswalk, or culver on the highway." See also *Roby v Mount Clemens*, 274 Mich App 26, 30; 731 NW2d 494 (2006).

The statutory notice provision, MCL 691.1404(1), provides:

> As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred . . . shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

In this case, the notice, supplemental claim form, and accompanying photographs were served upon defendant within 120 days. The notice, supplemental claim form, and photographs clearly identify the exact nature and location of the defect as a four to five inch vertical discontinuity between two slabs of concrete located on the sidewalk in front of 236 Cherokee

Road. The fact that plaintiff subsequently estimated the distance to the defect inaccurately has no impact of the validity of his written notice. In *Jakupovic v City of Hamtramck*, 489 Mich 939; 798 NW2d 12 (2011), our Supreme Court made it clear that a plaintiff is bound to the location of a defect identified in the plaintiff's pre-suit notice. In this case, it is not disputed that the location identified by plaintiff in his pre-suit notice, 236 Cherokee Road, is the location of the defect. Thus, plaintiff's notice satisfied the requirements of MCL MCL 691.1404(1)[1]

Defendant also argues that it was entitled to summary disposition under MCR 2.116(C)(8) and (10). Specifically, defendant argues that summary disposition was appropriate because there can be no question of fact regarding whether defendant had notice of the alleged defect because there is no evidence that a defect existed at the location plaintiff identified at his deposition—100 yards north of Voorheis Street on Cherokee Road.

When a motion for summary disposition is brought under both MCR 2.116(C)(8) and (10), MCR 2.116(C)(10) is the appropriate basis for review when the parties relied on matters outside the pleadings, as they did in this case. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008). "When reviewing a motion under MCL 2.116(C)(10), we consider all the evidence submitted by the parties in the light most favorable to the nonmoving party." *Id.* "Summary disposition should be granted only where the evidence fails to establish a genuine issue regarding any material fact." *Id.* at 457-458.

The trial court did not address this issue, and we find defendant's argument unavailing. Defendant's argument is premised on its claim that the exact location of plaintiff's accident is 100 yards north of Voorheis Street on Cherokee Road, as stated by plaintiff in his deposition. However, this location is contradicted by plaintiff's pre-suit notice and by plaintiff's later filed affidavit. It is not disputed that there is discontinuity in the sidewalk in front of 236 Cherokee Road, the location that plaintiff's notice identifies. Thus, defendant is not entitled to summary disposition because there is no defect 100 yards north of Voorheis Street on Cherokee Road.

[1] We note that while not raised in its statement of the issues, defendant also argues that the trial court erroneously considered an affidavit filed by plaintiff after his deposition wherein plaintiff stated that he subsequently went back and measured the distance between Voorheis Street and the defect and that his estimate of 100 yards was incorrect. Plaintiff's affidavit states that there are actually about 216 yards between Voorheis Street and the defect. Defendant's argument that the trial court inappropriately relied on plaintiff's affidavit to find a genuine issue of material fact is not supported by the record because the trial court simply concluded that plaintiff's notice complied with the statutory requirements; it did not find any genuine issue of material fact in regard to whether the notice satisfied the statutory requirements. Moreover, while defendant is correct that affidavits containing unfounded assertions directly contradicting a party's prior testimony will not be considered by a trial court in determining whether a genuine issue of material fact exists, *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 256-257; 503 NW2d 728 (1993), plaintiff's affidavit neither contained unfounded assertions nor directly contradicted his prior testimony. Rather, it merely expounded upon and gave context to plaintiff's testimony.

Finally, defendant argues that it is entitled to summary disposition because plaintiff cannot establish a genuine issue of material fact regarding whether a defect in the sidewalk was the proximate cause of his injuries. Specifically, defendant argues that plaintiff admitted that he did not actually see the defect that caused his injuries, and therefore, that plaintiff cannot prove that his injuries were caused by a defect in the sidewalk. Defendant maintains that plaintiff's theory of causation is based on mere assumption and hypothesis.

To avoid summary disposition for insufficient proof of causation, "[t]he plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result." *Skinner v Square D Co*, 445 Mich 153, 165; 516 NW2d 475 (1994) (citation omitted). The proof offered need only amount to a reasonable likelihood of probability, rather than a possibility. *Id.* at 166. The evidence presented need not negate all other possible causes, but it must exclude other reasonable hypotheses with a fair amount of certainty. *Id.*

In this case, plaintiff testified in his deposition that right after he fell he saw what he believed was a hole. He further testified that he crawled over the defect, and while he was not sure if he could actually see it, he could feel that the sidewalk was not level in that particular location and that the concrete slabs were "messed up." Plaintiff further stated that he noticed there was a problem with the sidewalk based on how his foot landed on the ground. Accordingly, plaintiff's statements indicate that he physically felt the vertical discontinuity between the two concrete slabs as he stepped from the first to the second slab. While plaintiff's testimony does not negate all other possible causes, it does exclude some other reasonable hypotheses with a fair amount of certainty. Thus, we conclude that plaintiff's deposition testimony provides a reasonable basis for one to conclude that it is more likely than not that defendant's failure to maintain the sidewalk was a cause in fact of his injury. Moreover, contrary to defendant's argument, plaintiff's theory with regard to causation is based on more than assumption and hypotheses. It is based on plaintiff's first-hand observations the night of the accident and his testimony describing what he was experiencing as the accident was occurring. Therefore, we conclude that plaintiff presented evidence sufficient to establish a genuine issue of fact regarding whether his injuries were proximately caused by the defect specified in the notice.

Affirmed. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Elizabeth L. Gleicher